



DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the Defense Production Act of 1950

AGENCY: Antitrust Division, U.S. Department of Justice.

ACTION: Notice of review of plan of action.

SUMMARY: Notice is hereby given pursuant to section 708 of the Defense Production Act of 1950 (“DPA”), that the Assistant Attorney General finds, with respect to the Plan of Action to Establish a National Strategy for the Manufacture, Allocation and Distribution of Personal Protective Equipment (PPE) to Respond to COVID-19 (“Plan of Action”) proposed by the Federal Emergency Management Agency (“FEMA”), that the purposes of section 708(c)(1) of the DPA may not reasonably be achieved through a plan of action having less anticompetitive effects or without any plan of action. Given this finding, the proposed Plan of Action may become effective following the publication of this notice.

SUPPLEMENTARY INFORMATION: Under the DPA, FEMA may enter into plans with representatives of private industry for the purpose of improving the efficiency with which private firms contribute to the national defense when conditions exist that may pose a direct threat to the national defense or its preparedness. Such arrangements are generally known as “voluntary agreements.” Participants in an existing voluntary agreement may adopt documented methods, known as “plans of action,” to implement that voluntary agreement. A defense to actions brought under the antitrust laws is available to each participant acting within the scope of a voluntary agreement and plan of action that has come into force under the DPA.

The DPA requires that each proposed plan of action be reviewed by the Attorney General prior to becoming effective. If, after consulting with the Chairman of the Federal

Trade Commission, the Attorney General finds that the purposes of the DPA's plans of action provision "may not reasonably be achieved through a . . . plan of action having less anticompetitive effects or without any . . . plan of action," the plan of action may become effective. 50 U.S.C. 4558(f)(1)(B). All functions which the Attorney General is required or authorized to perform by section 708 of the DPA have been delegated to the Assistant Attorney General, Antitrust Division. 28 CFR. 0.40(l).

On August 17, 2020, the Voluntary Agreement for the Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic ("Voluntary Agreement") became effective. The proposed Plan of Action contains documented methods to implement the Voluntary Agreement by creating a mechanism to immediately meet exigent PPE requests anywhere in the Nation, and to ensure that actions to support PPE stockpiling and reserves do not interfere with immediate requirements that would result in an unacceptable risk to healthcare providers or other potential PPE recipients. This mechanism involves the establishment several Sub-Committees by PPE type, which are designed to foster a close working relationship among FEMA, the Department of Health and Human Services ("HHS"), and participants in the Sub-Committees to address national defense needs through cooperative action under the direction and active supervision of FEMA. The proposed Plan of Action includes terms, conditions and procedures under which participants agree voluntarily to participate in the Sub-Committees. FEMA has certified that the proposed Plan of Action is necessary to provide for the national defense in the event of a pandemic.

FEMA requested that the Assistant Attorney General, Antitrust Division, issue a finding that the proposed Plan of Action satisfies the statutory criteria set forth in 50 U.S.C. 4558(f)(1)(B). The Assistant Attorney General, Antitrust Division, reviewed the proposed Plan of Action and consulted on it with the Chairman of the Federal Trade Commission. On December 2, 2020, by letter to Peter Gaynor, FEMA Administrator,

Makan Delrahim, Assistant Attorney General, Antitrust Division, issued a finding, pursuant to 50 U.S.C. 4558(f)(1)(B), that the purposes of the DPA's plans of action provision "may not reasonably be achieved through a . . . plan of action having less anticompetitive effects or without any . . . plan of action."

David G. B. Lawrence,

Chief, Competition Policy & Advocacy Section.

[FR Doc. 2020-26848 Filed: 12/4/2020 8:45 am; Publication Date: 12/7/2020]